No. 343

In The

Supreme Court of the United States

October Term, 1957

AMERICAN MOTORS CORPORATION, a MARYLAND CORPORATION, formerly known as NASH-KELVINATOR CORPORATION, a MARYLAND CORPORATION, and UNITED STATES OF AMERICA, Intervenor, Appellants

vs.

CITY OF KENOSHA, a Municipal Corporation

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

REPLY OF CITY OF KENOSHA TO PETITION FOR REHEARING

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I.

Introduction

The Government petitioned for rehearing in Nos. 18, 36 and 343. This reply brief will be limited to the issues involving Wisconsin law in No. 343. The brief of the City of Detroit and the County of Wayne in Nos. 18 and 36 will cover the issues involving Michigan law.

II.

This Court Affirmed the Wisconsin Tax AS APPLIED by the State Court.

Contrary to the statement in the Government's petition for rehearing (p. 3), this Court did not "overrule" the Wisconsin Supreme Court, either on a matter of state law or otherwise. In its opinion in the *Murray* case (Nos. 18 and 36), this Court specifically stated:

> "Consequently in determining whether these taxes violate the Government's constitutional immunity we must look through form and behind labels to substance * * *. *As applied—and of course that is the way they must be judged*—the taxes involved here imposed a levy on a private party possessing Government property which it was using or processing in the course of its own business." (Italics added)

In No. 343, it is notable that the Court granted the motion to *affirm* rather than the motion to dismiss.

The fact is that this Court indicated very clearly in its opinion in the *Murray* case that the *sole* issue was federal tax immunity and not the classification of the state tax as a "privilege" or "ad valorem" tax as apparently claimed by the Government (petition for rehearing, pp. 8-11). It is the *effect* of the tax on the federal Government—and not its classification—that determines the issue here involved. The fact that the Court may have used privilege taxes as a yardstick for determining the validity of ad valorem taxes "so far as constitutional immunity is concerned" (*Murray case*) does not mean that the Court changed or misapplied state statutes in any way whatever.

III.

The Wisconsin Tax is a General Tax Which Applies Throughout the State; It Does Not Discriminate Against the Federal Government, Its Property Or Those With Whom It Does Business.

Contrary to statements in the petition for rehearing (pp. 11-13), the Wisconsin tax applies alike—and will continue to apply alike—to all tax exempt entities, including the Federal Government, the State, its political subdivisions, churches and charitable organizations. Taxation and exemption in Wisconsin depends upon "ownership" (Sections 70.11 and 70.18, *Wisconsin Statutes*), and the Wisconsin Supreme Court *in this very case* has laid down standards of general application for determining that issue (Jurisdictional Statement, p. 30). The rule of the Wisconsin Court that "title" will be disregarded in favor of true ownership will apply regardless of whether the Federal Government or some other tax-exempt entity is involved.

The fact that the Wisconsin rule is one of general application and gives the Federal Government as much protection as any other tax-exempt entity is illustrated by *State ex rel. Superior Shipbuilding Co. v. Beckley* (1921), 175 Wis. 272, 185 N. W. 199. In that case the Federal Government's "title" to materials used by a private shipbuilder was buttressed with additional incidents of ownership. The Wisconsin Court held that ownership for tax purposes was in the Federal Government, thereby making the property exempt. This same rule will still apply in Wisconsin regardless of the fact that the United States Supreme Court has held that Wisconsin *could*, if it wanted to, tax the pri-

vate shipbuilder on the privilege of *using* government property.

As clearly indicated by *State ex rel. Reconstruction Finance Corporation v. Sanlader* (1946), 250 Wis. 481, 27 N. W. 2d 447, cited in the Government's petition for rehearing (p. 10), the Wisconsin court will not tax the property of tax-exempt entities without specific statutory authorization, regardless of whether the Federal Constitution permits such taxation.

IV.

This Court Did Not Purport to Determine Ownership.

In its opinion in the *Murray* case, this court *assumed* that "full title" was in the United States. This was practically the same as saying that the question of "full title" was immaterial in the present case—at least so far as Federal Constitutional questions were concerned. It certainly did not amount to a finding, as inferred in the petition for rehearing (pp. 9-10), that true ownership was in the Federal Government, either for purposes of federal immunity or for purposes of state taxing statutes.

In Wisconsin, now as before, the question of ownership remains the same in respect to the exemption statutes. The quotation in the petition for rehearing (p. 9) relative to "title" does not state Wisconsin law accurately. That quotation comes from the opinion of the Wisconsin Circuit Court which was expressly *overruled* by the Wisconsin Supreme Court in the present case. Taxation in Wisconsin depends upon ownership and not "title."

V.

The Economic Burden Falling on the Federal Government is No More Than That Which Would Otherwise Fall Upon Local Communities.

In its petition for rehearing (pp. 13-16), the Government emphasizes the additional economic burden it will have to sustain if Government contractors are subject to local taxation. The complete answer to this contention is that the economic burden must be borne by someone, be it the Federal Government or the local taxpayers. Since the Government is acting in the interests of all its citizens, there is considerable justification for placing the economic burden where it will be shared by everyone rather than by the taxpayers of communities where government contractors are doing business.

So far as the retroactive tax liability is concerned, we doubt that the situation is as serious as stated in the petition for rehearing.

First of all, the Government's estimate of the "colossal burden" (Petition for Rehearing, pp. 13-16) is based upon its assumption that the Court has *changed* or *amended* state statutes to permit taxation of property interests never before taxable. As pointed out above, this is patently wrong. The various states, including Wisconsin and Michigan, will continue to tax only what the taxing statutes specifically authorize, and there will be no retroactive taxation of the mere "possession" of tax-exempt property *unless* authorized by specific statute.

Furthermore, the Court's decision in the present case is but an application of general principles set forth in pre-

vious cases. If the "private contractors" mentioned in the petition for rehearing had wished to avoid the burden of additional local taxes they could have protected themselves in their contracts with the Government and probably did so in most instances.

VI.

Conclusion

Under this Court's decision, Wisconsin will continue to apply its taxes on the basis of true ownership as interpreted by the Wisconsin Supreme Court. Wisconsin will not base any taxes upon the mere possession of tax-exempt property *unless* and *until* the legislature adds an appropriate provision to the statutes. The rule of the Wisconsin Constitution that taxation shall be uniform (Article VIII, Section 1) will continue to be applied to all persons and property.

The petition for rehearing should be denied.

Respectfully submitted,

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